BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES C. REDRICK	)	
Claimant	)	
VS.	)	
	)	
S & J PAINTING, INC.	)	Docket No. 1,049,017
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of Administrative Law Judge Rebecca A. Sanders' September 21, 2012 Award. The Board heard oral argument on February 13, 2013. The Director of Workers Compensation appointed Lee Kinch to serve as Board Member Pro Tem in place of Gary R. Terrill, who recused himself from this proceeding.

Judge Sanders found claimant failed to prove that he sustained any new permanent impairment to his cervical or cervicothoracic spine and, using the AMA *Guides*,[1] awarded claimant a 10% functional impairment to the left upper extremity at the level of the shoulder based on the rating of Terrance Pratt, M.D., one of the court-ordered physicians.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Kevin M. Johnson, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations in the Award. The record also consists of the court-ordered report of Lan Fotopoulos, M.D., dated April 9, 2012, and the court-ordered report of Terrence Pratt, M.D., dated May 17, 2010. For reasons listed below, the Board is striking Dr. Pratt's deposition from the record.

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All further references to the *Guides* are based upon the fourth edition of the AMA *Guides*.

ISSUES

Respondent denies claimant's alleged accidental injury arose out of and in the course of his employment. Respondent asserts that if the claimant's injury arose out of and in the course of his employment, his impairment should be limited to the left shoulder. Claimant argues Judge Sanders' use of Dr. Pratt's opinions was improper because respondent improperly contacted such court-ordered physician without prior court approval. Claimant requests that the Board adopt Dr. Lan Fotopoulos' opinion that claimant sustained a whole person impairment.

The issues for the Board's review are:

1. Did Judge Sanders err in relying on Dr. Pratt's opinions, medical records from non-testifying physicians or prior settlement hearing transcripts?

2. Did claimant meet with personal injury by accident arising out of and in the course of his employment on September 21, 2009?

3. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Respondent was a subcontractor of Picerne. On September 18, 2009, claimant carried approximately 10 five gallon buckets of paint, two at a time, a distance of 30 to 40 feet. Claimant felt stiff and a little sore, but did not pay much attention to these symptoms. On September 21, 2009, claimant was using a sanding pole to sand walls when his left arm locked up. Pain shot down the left side of his neck over his left shoulder and down his back. Claimant notified his supervisor, Scott Prockish. Mr. Prockish testified that claimant said he reaggravated a preexisting injury. Mr. Prockish advised claimant to see Picerne's safety audit manager and told him Picerne would have him tested for alcohol consumption. Claimant was seen at Mercy Regional Health Center that very day. His alcohol test was positive. There was no evidence alcohol played any role in claimant's accidental injury. Claimant was no longer allowed to work on the Picerne project.

A preliminary hearing was held on March 10, 2010. Claimant requested temporary total disability benefits and medical treatment. Claimant acknowledged prior injuries and settlements involving the right side of his neck and right shoulder:

- On December 18, 2006, claimant was working for All Cities Enterprises when he sustained an injury to his neck, along with pain and numbness in his arms and hands, from painting and rolling on high walls and ceilings. Claimant declined neck injections. Claimant settled any and all issues in this claim, including future medical treatment and review and modification, on December 20, 2007 for $10,000.

- On July 31, 2008, claimant had right-sided neck and right shoulder blade pain while lifting a power washer out of the back of a truck for his employer, EVCO. Claimant had neck injections. Dr. Michael Poppa performed an independent medical evaluation on April 10, 2009. Claimant testified that at the time of this evaluation, he told Dr. Poppa, "I can't look up and roll paint anymore" and his neck was very stiff, like a constant cramp. Claimant settled all issues in this claim on August 20, 2009 for $20,000.

Claimant testified he was under no restrictions at the time of his September 21, 2009 accident and was able to do all of his work as a painter. Judge Sanders denied claimant's request for temporary total disability benefits (TTD):

> Claimant continues to file for unemployment insurance benefits certifying that he is able to work. Claimant is either not being truthful on his claim for unemployment insurance benefits or about being temporarily and totally disabled.
>
> The Court concludes that Claimant is being less than truthful about being temporarily and totally disabled.[2]

Judge Sanders ordered an independent medical evaluation with Terrence Pratt, M.D. Dr. Pratt was to address claimant's diagnosis, treatment recommendations, ability to work/temporary work restrictions and causation. Judge Sanders' Order stated the attorneys were to send Dr. Pratt a joint letter confirming the appointment and itemizing relevant medical records for his review. The Order indicated any further contacts with or requests to Dr. Pratt had to be by agreement of the parties or court approval. Judge Sanders' March 10, 2010 letter to Dr. Pratt also indicated attorney contact with him was not allowed unless she decided to allow any such communication.

Dr. Pratt evaluated claimant on May 17, 2010. Claimant complained of left-sided cervical, lumbosacral and shoulder discomfort, and numbness in the left ring and pinky fingers. Claimant reported prior injury and permanent impairment to his right shoulder and right neck. Dr. Pratt diagnosed claimant with cervicothoracic syndrome with radicular symptoms and left shoulder syndrome. Dr. Pratt did not relate claimant's low back symptoms to the work injury.

Peter V. Bieri, M.D., evaluated claimant on February 21, 2011, at the request of claimant's attorney. Claimant presented with marked left neck pain radiating into both upper extremities, more so on the left than the right, with numbness and tingling, in addition to low back pain radiating into both lower extremities. Claimant told Dr. Bieri that he had a prior right-sided neck injury and settlement. Dr. Bieri opined that claimant sustained a 5% whole person impairment based on DRE Cervicothoracic Category II of the *Guides*.

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[2] ALJ Order (March 11, 2010) at 1-2.

Renee Nickerson, a claim representative for ACE USA, asked Dr. Pratt to provide an impairment rating. In his March 4, 2011 report. Dr. Pratt opined claimant had a 5% whole body impairment, based on DRE Cervicothoracic Category II, as well as a 10% left shoulder impairment (which is equivalent to a 6% whole person), for a combined 11% whole body impairment based on the *Guides.* Dr. Pratt observed that claimant reported prior cervical and right shoulder problems. He noted any preexisting left upper extremity or cervical impairment should be apportioned.

Claimant had a radiofrequency nerve ablation for left-sided neck pain at Manhattan Pain & Spine on June 27, 2011. Radiofrequency nerve ablation is a procedure in which a heated needle cauterizes a nerve root to negate pain emanating from such nerve root; this is not always a permanent solution, as the nerve root grows back after 16-18 months.[3]

Respondent's counsel, on an *ex parte* basis, sent to Dr. Pratt a June 29, 2011 letter requesting apportionment based on claimant's prior settlements. In response, Dr. Pratt issued a July 13, 2011 letter indicating claimant's cervicothoracic rating was 0%.

Claimant testified at the September 22, 2011 regular hearing that all of his previous right-sided neck and right shoulder problems had resolved and he was fully functional before his September 21, 2009 accidental injury.

Dr. Bieri testified that claimant's September 21, 2009 accident resulted in neck and left upper extremity symptoms and a 5% whole body impairment based on DRE Cervicothoracic Category II, with the possible exception that a prior rating existed. He found no upper extremity impairment. Dr. Bieri was unaware of any prior impairment. He never reviewed any pre-injury records. When questioned regarding assigning an impairment rating to only one side, Dr. Bieri testified that the *Guides* allow impairment to one side of the neck based on active range of motion.[4] Dr. Bieri testified that a physician may rate a claimant to the neck even if the claimant had a prior injury or settlement involving the opposite side of the neck. He also testified that a claimant could get an impairment rating for one level of the spine and later still get a rating for a different level, even though both injuries involved the spine.

Dr. Pratt testified on March 1, 2012 that claimant only had a 10% left shoulder impairment. Dr. Pratt testified claimant's prior cervicothoracic impairment, regardless of which side of the neck was involved, exceeded the 5% rating he provided, so claimant had no new cervicothoracic impairment. Dr. Pratt stated the *Guides* do not rate one side of the neck or the other side, just the cervicothoracic region. Dr. Pratt testified the *Guides* allow for ratings at different levels of the spine if there is a structural change, but not for soft tissue or subjective complaints.

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[3] Fotopoulos Depo. at 44-45, 52.

[4] Bieri Depo. at 31-32.

Dr. Pratt acknowledged having claimant's report of prior cervicothoracic permanency when he wrote his initial rating report. Dr. Pratt had two prior ratings in his file when his initial report was completed, but no documentation of settlements. Claimant's counsel repeatedly complained about respondent's counsel's *ex parte* communication with Dr. Pratt and noted it would be up to the judge to consider whether to admit Dr. Pratt's reports.[5]

Judge Sanders and counsel conferred on March 5, 2012 based on claimant's attorney's objection to Dr. Pratt's opinions. Claimant's attorney contends Judge Sanders advised she would exclude Dr. Pratt's testimony and opinions based on *ex parte* contact, but there is no written order or indication in the administrative file. Judge Sanders did order a new independent medical evaluation with the first available physician at the Dickson-Diveley Midwest Orthopaedic Clinic, Lan Fotopoulos, M.D., who is board certified in physical medicine and rehabilitation. Dr. Fotopoulos was to evaluate claimant's accident-related permanent impairment and to address preexisting impairment using the *Guides*.

Claimant again had radiofrequency nerve ablation for left-sided neck pain on March 6, 2012.[6]

Dr. Fotopoulos evaluated claimant on April 9, 2012. His report stated:

> After a complete review of the records given, a physical exam and history was taken[.] I believe his left neck and shoulder pain is not [a] pre-existing condition[;] previous shoulder and neck pain has resolved and was on the right side. I also, believe that the left shoulder and neck pain is related to his work as a painter on the day he was carrying the 5 gallon buckets. Based on the American Medical Association [G]uides to Evaluation of Permanent Impairment I would rate his impairment at 8% of the whole person since he has also required [c]ervical [r]adiofrequency [a]blation for help with his symptoms.[7]

Dr. Fotopoulos testified on August 21, 2012. He testified claimant's prior symptoms involved the right side of his neck and the right shoulder, but his current symptoms involved the left side of his neck and left shoulder. Dr. Fotopoulos agreed that the *Guides* do not differentiate between right-sided and left-sided complaints. He testified that if claimant had prior cervicothoracic impairment, it would be relevant if such prior impairment involved the left side of claimant's neck and left shoulder. He did not know about claimant's prior settlements prior to issuing his rating. Dr. Fotopoulos stated that claimant's prior right-sided neck and shoulder symptoms resolved before his September 21, 2009 accidental injury, but he could not say when that resolution of symptoms occurred.

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[5] Pratt Depo. at 15, 18, 23-36, 47, 49-54.

[6] Fotopoulos Depo. at 26-27.

[7] Dr. Fotopoulos' April 9, 2012 court-ordered report at 4.

Dr. Fotopoulos agreed that claimant had bilateral shoulder and neck complaints in April 2009, as based on a non-testifying physician's (Dr. Poppa's) report, and as based on an August 11, 2008 pain drawing showing some left neck and left-sided neck area complaints, but more marked complaints on the right side. Dr. Fotopoulos testified that claimant's left-sided symptoms were expressly from the September 21, 2009 injury.

Dr. Fotopoulous testified his impairment rating opinion was based on DRE Category II in the *Guides*, but was increased because claimant had radiofrequency ablation. Dr. Fotopoulos acknowledged that he "bounced between" the *Guides* and the 5th Edition of the *Guides*.[8] He pointed to the correct edition of the *Guides* when asserting claimant had an 8% impairment rating, but acknowledged DRE Category II of the Guides only assigns a 5% rating for such category, while the 5th Edition of the *Guides* assigns a 5-8% rating for DRE Category II.[9] Dr. Fotopoulos indicated claimant did not qualify for DRE Cervicothoracic Category III under the Guides for a 15% impairment rating. Dr. Fotopoulos clarified his impairment rating opinion as follows:

> Q. [J]ust utilizing the DRE category or using the Fourth Edition AMA Guides, forget the fifth for a minute, he clearly falls in or exceeds category 2 which is the five percent?
>
> A. Correct.
>
> Q. And did you feel it was your judgment that it was more proper to give him an eight percent based upon the Fourth Edition AMA Guides that a 15 percent would be category 3 – I think you said that he had a five percent, but you gave him a few more percent his [sic] because he had that procedure, the nerve ablation; is that right?
>
> A. That's correct.
>
> Q. So if we told you you had to ignore the fifth edition all together, you wouldn't switch your rating because you felt three percent was appropriate for having the nerve ablation procedure?
>
> . . .
>
> A. . . . He had more than a simple neck strain and required a procedure which does hold risks to it and sometimes require to be repeated in the future, so I felt that this – he was entitled to more than five percent.[10]

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[8] Fotopoulos Depo. at 31.

[9] *Id.* at 31-32.

[10] *Id.* at 47-48; see also p. 25 (claimant's rating increased due to nerve root ablation).

Dr. Fotopoulos further testified regarding apportionment as follows:

> Q. All right. So even if the Judge decided that he had a neck problem a long time ago on the right side and deserved five percent pre-existing for that problem, you would still give him an extra three percent for the nerve ablation and it would be more serious than a strain is what you are saying?
>
> A. Yes, I would.[11]

In Judge Sanders' September 21, 2012 Award, she ruled that claimant had a work-related accidental injury, but failed to prove additional cervicothoracic spine impairment above and beyond his preexisting impairment. Judge Sanders noted that claimant settled cases involving the right side of his neck and right shoulder in 2007 and 2009. Judge Sanders specifically found not credible claimant's testimony that his prior right-sided cervicothoracic complaints resolved. Judge Sanders ruled that claimant's 2007 and 2009 right-sided cervicothoracic impairment was preexisting impairment for the purposes of the current claim, as the *Guides* draw no distinction between left-sided or right-sided complaints. Judge Sanders concluded that both the 2007 and 2009 settlements were for at least a 5% impairment to the body as a whole for either the cervical spine or the cervicothoracic spine. Judge Sanders noted that even if she adopted Dr. Fotopoulos' 8% impairment rating to claimant's cervicothoracic spine, claimant's two prior ratings exceeded 8% to the body as a whole. Judge Sanders awarded claimant a 10% impairment to the left shoulder, as based on Dr. Pratt's opinion.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g) note that it is claimant's burden to prove entitlement to benefits by a preponderance of the credible evidence. Respondent must pay compensation for personal injury by accident arising out of and in the course of employment:

> The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[12]

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[11] *Id.* at 48-49.

[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

K.S.A. 2009 Supp. 44–501(c) states that any award shall be reduced by preexisting functional impairment. It is respondent's burden to prove preexisting impairment based on the Guides.[13]

K.S.A. 44-510d(a) states in part:

> If there is an award of permanent disability . . . compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
> . . .
>
> (13) For the loss of an arm, . . . including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.
> . . .
>
> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto . . . . Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-516 states:

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

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[13] See *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Webb v. Rose Villa, Inc.*, No. 1,047,270, 2012 WL 2890460 (Kan. WCAB Jun. 4, 2012).

K.S.A. 44-519 provides:

> [N]o report of any examination of any employee by a health care provider . . . and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

ANALYSIS

Before addressing the merits of the case, the Board must consider three evidentiary issues: (1) whether to include as evidence all, part or none of Dr. Pratt's opinions and reports; (2) whether to include as evidence claimant's medical records that lack supporting physician testimony from a health care provider; and (3) whether to consider prior settlement hearing transcripts and attached medical reports.

Should the Board consider Dr. Pratt's opinions?

Dr. Pratt's May 17, 2010 report is in evidence based on the directive in K.S.A. 44-516 that the court-ordered report shall be considered by the administrative law judge. Such report from Dr. Pratt was his only report that Judge Sanders requested. Dr. Pratt's March 4, 2011 rating report was requested by an insurance adjuster.

The attorneys were not to have *ex parte* contact with Dr. Pratt absent court approval. Respondent's attorney wrote a June 29, 2011 *ex parte* letter to Dr. Pratt and requested Dr. Pratt to apportion his rating with claimant's prior ratings. Based on this *ex parte* contact, Dr. Pratt indicated in a July 13, 2011 letter that claimant had no new cervicothoracic impairment. Claimant's attorney impliedly objected to Dr. Pratt's opinions. There is no record that claimant's attorney's objection was ruled upon, but Judge Sanders appointed a new independent medical evaluation with Dr. Fotopoulos.

Striking a court-ordered physician's addendum report from the evidentiary record due to *ex parte* contact is not always necessary where the opposing party is not prejudiced and the physician's intended opinion was not altered.[14] In *Birmingham*,[15] the Board refused to consider a court-ordered physician's deposition, but considered the original and untainted report, as follows:

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[14] *Lynch v. Four B Corporation d/b/a Hen House Supermarket*, No. 199,852, 1996 WL 670515 (Kan. WCAB Oct. 3, 1996).

[15] *Birmingham v. Deffenbaugh Disposal Services*, No. 208,094, 1999 WL 292835 (Kan. WCAB Apr. 30, 1999).

> The Order of Administrative Law Judge Witwer was specific regarding what, if any, contact was allowed by the attorneys with Dr. Tillema. Even though the contact by respondent's attorney was after Dr. Tillema's report was prepared, it did, nevertheless, have a direct influence on Dr. Tillema's testimony and his opinion regarding claimant's functional impairment and limitations. The Appeals Board finds this contact did violate the Order of Judge Witwer and, therefore, the deposition of Dr. Tillema will not be considered. However, the report of Dr. Tillema was provided on July 25, 1996. The contact between Dr. Tillema and respondent's attorney did not occur until May 1, 1997. Therefore, Dr. Tillema's report was not tainted by this contact, and will be considered by the Appeals Board.

Likewise, in *Thomas*,[16] the Appeals Board noted:

> As the law of this case prohibited the attorneys from having contact with Dr. Brown unless the contact was joint, the contact by claimant's attorney prior to the deposition was inappropriate and could have improperly influenced Dr. Brown in his testimony regarding claimant's injuries and current conditions, as well as his preexisting limitations and injuries. The Board, therefore, finds that both the deposition and the report of Dr. Brown are to be excluded from this case.

Birmingham and *Thomas* control. The Board concludes that Dr. Pratt's deposition and his reports, other than his May 17, 2010 report, are stricken from the evidentiary record, including his initial rating report and his altered rating report. Judge Sanders was clear that contact with Dr. Pratt was not permitted without her approval. Respondent's counsel sent an *ex parte* letter to Dr. Pratt. Dr. Pratt's opinions were compromised. Counsel could have obtained judicial approval to contact Dr. Pratt or presented information concerning prior settlements at Dr. Pratt's deposition. These options did not occur. While Dr. Pratt may have reached the same conclusions absent the *ex parte* communication, it is impossible to say claimant was not prejudiced.

The Board's conclusion is buttressed by an exchange between counsel during Dr. Fotopoulos' deposition. Claimant's counsel objected that some of the records considered by Dr. Fotopoulos may have been "tainted" documents from Dr. Pratt. Respondent's counsel stated he "would stipulate that nothing from Dr. Pratt will be sent to the Judge."[17]

Should the Board consider medical records offered without supporting testimony?

Respondent offered into evidence Fotopoulos Exhibit 4, which was all of the medical records that were sent by the parties jointly to Dr. Fotopoulos. Claimant objected that many of the medical records contained inadmissible medical hearsay. There is no indication such objection was ruled upon.

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[16] *Thomas v. District Lodge 70*, No. 1,010,813, 2005 WL 3665473 (Kan. WCAB Dec. 22, 2005).

[17] Fotopoulos Depo. at 40.

Under K.S.A. 44-519, medical reports that are not supported by the health care provider's testimony are not be considered part of the evidentiary record. There are exceptions to the general rule. Medical reports may be considered as evidence when the parties agree to their admission.[18] Moreover, a court-ordered medical report shall be considered in determining the final award.[19] Fotopoulos Exhibit 4 is excluded from evidence as lacking supporting testimony of various health care providers.

Should the Board consider the prior settlement hearing transcripts and medical attachments?

Respondent offered Fotopoulos Exhibits 2 and 3, which were copies of settlement hearing transcripts with attached medical reports from Drs. Curtis and Poppa. Claimant objected. The Board is not considering the medical reports appended to the settlement hearing transcripts as evidence. The medical records attached to the settlement hearing transcripts were not supported by the testimony of these physicians and there was no stipulation or agreement between the parties as to the admission of such records.[20] The mere fact that the Division of Workers Compensation maintains records concerning prior settlements does not somehow serve as a method to circumvent the mandate in K.S.A. 44-519 that reports from health care providers are not in evidence absent the testimony of such health care providers.[21] The Board, however, does consider the settlement hearing transcripts standing alone as evidence.

Did claimant suffer accidental injury arising out of and in the course of his employment?

As indicated by Judge Sanders, respondent presented no evidence to contradict claimant's testimony that he had an accidental injury at work on September 21, 2009. Respondent's argument that claimant's current complaints are the direct and natural result of his prior cervical injuries[22] is a theory without any expert medical support in the record.

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[18] K.A.R. 51-3-5a. An example of the parties agreeing to consider medical reports as evidence, even without physician testimony, is in *Kirker v. Bob Bergkamp Construction Co.*, Inc., No. 107,058, 286 P.3d 576 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012), where the claimant offered into evidence a prior settlement hearing transcript and the attached medical reports without objection from respondent.

[19] See K.S.A. 44-510e and K.S.A. 44-516.

[20] See *Woods v. Air Technologies, Inc.*, Nos. 176,263 & 176,254, 1998 WL 51297 (Kan. WCAB. Jan. 30, 1998) and *Zimmer v. Central Kansas Medical Center*, No. 186,009, 1997 WL 229454 (Kan. WCAB Apr. 30, 1997).

[21] As an aside, K.S.A. 2011 Supp. 44-501(e) provides for conclusive establishment of preexisting impairment based on prior settlements or awards. Such statute does not apply to this 2009 accident.

[22] Respondent's Brief at 18.

Respondent argues there was no proof of injury. K.S.A. 2009 Supp. 44-508(e), which defines "personal injury," requires no external or visible proof of a physical injury. While there is no need that a claimant present visible proof of a physical lesion to prove personal injury, claimant did have radiofrequency nerve ablation performed at C3-7 on the left to effectively remove six facet pain generators.[23] Dr. Fotopoulos impliedly attributed the need for such procedure to the September 21, 2009 work accident by including the procedure as part and parcel of the rating he attributed to the accidental injury. There is no proof that such left-sided nerves were involved in claimant's prior settlements.

What is the nature and extent of claimant's disability?

After excluding the medical reports attached to the settlement hearing transcripts and Dr. Pratt's tainted opinion, the evidence shows:

- Special Administrative Law Judge Jon Nodgaard stated at the December 20, 2007 settlement hearing that Dr. Curtis provided a 10% whole body rating for claimant's cervical spine and a 14% upper extremity rating (he did not state which arm) for a December 18, 2006 accidental injury at All Cities. The claimant accepted $10,000 to resolve any and all issues, including review and modification and future medical treatment.

- On August 20, 2009, Special Administrative Law Judge Jerry Shelor approved the settlement for claimant's July 31, 2008 accidental injury based on a 10.75% disability to the body as a whole and waiver of any and all rights on the part of the claimant.

- Claimant testified that these two prior injuries and settlements involved the right side of his neck and his right shoulder. Claimant testified his September 21, 2009 accidental injury resulted in left-sided cervicothoracic and left shoulder symptoms. There is very little evidence that the prior injuries and impairments significantly involved the left side of claimant's cervicothoracic spine or his left shoulder. Dr. Fotopoulos acknowledged that an August 11, 2008 pain drawing demonstrated that claimant had some left neck left-sided neck area complaints (but more "severe"[24] right-sided neck and shoulder complaints), in addition to acknowledging that Dr. Poppa's report from April 2009 indicated claimant had complaints involving both shoulders and his neck. Other than these two medical records, no other records were discussed with testifying physicians to demonstrate a preexisting issue involving the left shoulder or the left side of claimant's neck.

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[23] Fotopoulos Depo. at 52.

[24] *Id.* at 22.

- Dr. Bieri testified claimant had a 5% whole body cervicothoracic impairment for the September 21, 2009 accidental injury based on left-sided complaints. While Dr. Bieri was unaware of prior impairment ratings, he was not shown or told about the prior ratings. Dr. Bieri was not asked if his opinion regarding permanent impairment due to the 2009 accidental injury would be altered due to prior impairment. Dr. Bieri was not asked whether claimant had any additional impairment due to the 2009 accidental injury above and beyond any preexisting impairment.

- Dr. Fotopoulos gave claimant an 8% whole body impairment rating for left-sided cervicothoracic impairment. While Dr. Fotopoulos used both the *Guides* and the 5th Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment* to provide a rating, he ultimately indicated that his rating would still be 8% using only the *Guides*. While Dr. Fotopoulos agreed claimant had bilateral shoulder and neck complaints when seen by Dr. Poppa in April 2009 and there were some markings of him having left-sided neck and shoulder complaints in August 2008, Dr. Fotopoulos never agreed that claimant had preexisting impairment, that any such impairment involved the left side of claimant's neck and his left shoulder, or that he was changing his opinion that claimant had an 8% whole body impairment rating due to the September 21, 2009 accidental injury.

Claimant contends his left-sided neck and left shoulder injury differentiates the current claim from his prior right-sided neck and right shoulder claims. Judge Sanders ruled that the *Guides* do not differentiate between right-sided and left-sided impairment, just regions of the body. Part of this conclusion was based on Dr. Pratt's testimony. As noted above, the Board struck Dr. Pratt's testimony from the evidentiary record. Additionally, the Board cannot locate precedent that holds impairment to the right side of the neck is considered preexisting as compared to what may be new impairment to the left side of the neck. The Board has generally ruled that injuries involving new aspects of the same body part are new and different injuries.[25] The Board does not conclude, at least based on the facts and evidence, that claimant's left-sided neck impairment should be reduced by prior impairment involving the right side of his neck and right shoulder.

Judge Sanders also concluded it would be reasonable to find that claimant's 2007 settlement was at least based on a 5% impairment to the cervical spine and claimant's 2009 settlement was at least based on a 5% impairment to the cervicothoracic spine. She indicated Dr. Fotopoulos' 8% rating would not exceed claimant's preexisting impairment.

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[25] See *Keeting v. Baker Concrete Construction*, No. 216,891, 2003 WL 23172917 (Kan. WCAB Dec. 23, 2003); *Medina v. Beef Products, Inc.*, No. 1,008,583, 2004 WL 515890 (Kan. WCAB Feb. 26, 2004); *Oeser v. U.S.D. 259*, Nos. 1,028,112 & 1,028,114, 2007 WL 2296140 (Kan.WCAB July 10, 2007); *Von Kessler v. Multi Chem Group*, No. 1,034,895, 2009 WL 3710741 (Kan. WCAB. Oct. 28, 2009); and *Huffman v. Exodyne*, No. 1,053,501, 2012 WL 758303 (Kan. WCAB Feb. 24, 2012).

The problem with this approach is two-fold: (1) claimant testified his prior impairment involved the right side of his neck and right shoulder, whereas his current impairment involves the left side of his neck and his left shoulder, as based on the opinions of both Dr. Bieri and Dr. Fotopoulos; and (2) when eliminating Dr. Pratt's tainted report and testimony, no physician testified claimant actually had any overlapping and preexisting impairment.

The Board finds no reason to discount the impairment ratings in evidence and weighs them equally. Averaging the ratings from Drs. Bieri and Fotopoulos, the Board finds claimant proved a 6.5% whole body impairment involving his cervicothoracic spine for his left-sided neck complaints. There is no substantial or credible evidence that claimant had preexisting left-sided neck and cervicothoracic spine impairment. Both Drs. Bieri and Fotopoulos agreed claimant fit under DRE Category II under the *Guides*. The additional 3% impairment rating assessed by Dr. Fotopoulos – based on claimant having radiofrequency ablation – is not strictly supported, or *not* supported, by the *Guides*. A physician may use his judgment to address impairments not addressed by the *Guides*.[26]

The Board shares Judge Sanders' concerns about claimant's credibility. There is an obvious disconnect between claimant settling his 2008 accidental injury approximately one month before his 2009 accidental injury and his testimony that his right-sided neck and shoulder complaints that were due to the 2008 accident resolved before the 2009 accidental injury. It is unrealistic that he fully recovered in the intervening month. Similarly, claimant having told Dr. Poppa, in April 2009, that he could not look up and paint anymore, is not believable. Claimant began doing the same sort of work for respondent in May 2009.

While Judge Sanders indicated claimant's argument that left-sided neck impairment is not impacted by prior right-sided neck impairment was not credible, this was actually his counsel's argument, which will not be imputed to claimant for a credibility determination.

Judge Sanders' March 11, 2010 preliminary hearing Order indicated claimant was less than truthful by trying to get TTD when he was already receiving unemployment benefits. These concepts are mutually exclusive, i.e., a worker can not be simultaneously temporarily and totally disabled, but also ready, willing and able to work. However, claimant made it known at the hearing that he was drawing unemployment and would alert unemployment if he received TTD. The Board views claimant's situation as more legally inconsistent as opposed to demonstrating outright dishonesty.

Claimant's credibility thus boils down to how he characterized the severity of his prior right-sided neck and shoulder complaints at different times. The Board does not view claimant's statements regarding his preexisting right-sided neck and shoulder condition as particularly relevant in addressing his current left-sided neck and shoulder injury. If the

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[26] K.S.A. 44-510e(a); See *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 202 P.3d 108 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010, and *Kinser v. Topeka Tree Care*, No. 1,014,332, 2006 WL 2632002 (Kan. WCAB Aug. 1, 2006).

injuries or any impairment truly overlapped and if there was credible medical evidence that claimant's current condition was a mere continuation of his prior condition, the Board might take a different stance. As the record stands, the Board does not view claimant's credibility concerns as impacting his entitlement to a whole body impairment.

The Board does not particularly find claimant deserving of a work disability award. However, *Bergstrom* [27] plainly indicates that if a claimant has whole body impairment and at least 10% wage loss, the Board has no option other than to award a work disability. The Kansas Workers Compensation Act must be applied as written.[28]

Claimant worked for respondent until January 2010. He worked 40 hours per week earning $15 per hour. His average weekly wage was $600. From July 10, 2010 to sometime in August 2010, claimant worked at Labor Max earning $10 per hour for 40 hours per week. From March 2011 through October 24, 2011, he worked for Strategic Resources, Inc., earning $11.21 per hour, plus an additional $3.51 per hour for insurance, for 32 hours per week. Claimant was unemployed at all other times subsequent to last working for respondent.

Dr. Bieri opined claimant should have medium restrictions, limiting him to lifting 50 pounds or less. Of 13 unduplicated tasks on a list compiled by vocational expert Richard Santner, Dr. Bieri opined claimant could not perform three for a 23% task loss. Dr. Bieri's testimony that claimant has a 23% task loss is the only task loss opinion in evidence. Claimant failed to prove that he did not earn comparable wages until some time after January 2010. He would have had:

- a 61.5% work disability from February 1, 2010 through July 9, 2010;
- a 28% work disability from July 10, 2010 through August 31, 2010;
- a 61.5% work disability from September 1, 2010 through February 28, 2011;
- a 22.25% work disability from March 1, 2011 through October 24, 2011; and
- a 61.5% work disability thereafter.

CONCLUSIONS

The Board finds Judge Sanders' Award should be reversed to the extent it limited claimant to an award based on left shoulder impairment only. Dr. Pratt's tainted opinions are excluded from the record. Based on the evidence, including Dr. Fotopoulos' court-ordered report, claimant proved a 6.5% whole body impairment. Based on his last work disability percentage, claimant is entitled to 255.23 weeks of permanent partial disability benefits at the compensation rate of $400.02, not to exceed a total award of $100,000.

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[27] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676, 678 (2009).

[28] *Id.* at 607-08.

AWARD

WHEREFORE, the Board rules Administrative Law Judge Rebecca Sanders' September 21, 2012 Award is reversed to the extent indicated in the conclusions section.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
rdfincher@ksjustice.com

Kevin M. Johnson, Attorney for Respondent and its Insurance Carrier
kjohnson@swabe.com

Honorable Rebecca Sanders, Administrative Law Judge

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES C. REDRICK	)	
Claimant	)	
VS.	)	
	)	
S & J PAINTING, INC.	)	Docket No. 1,049,017
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

NUNC PRO TUNC ORDER

The Board omitted from its Order entered in this case on April 3, 2013, a calculation of benefits due and owing and what benefits are ordered into the future, which should have been included after the last paragraph on page 15. The Order is corrected to read:

The claimant is entitled to 18.86 weeks of permanent partial disability compensation at the rate of $400.02 per week or $7,544.38 for a 6.5% work disability followed by permanent partial disability compensation at the rate of $400.02 per week not to exceed $100,000.00 for a 61.5% work disability.

As of April 3, 2013 there would be due and owing to the claimant 184.29 weeks of permanent partial disability compensation at the rate of $400.02 per week in the sum of $73,719.69 for a total due and owing of $73,719.69, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $26,280.31 shall be paid at the rate of $400.02 per week until fully paid or until further order from the Director.

All other statements, findings and conclusions in the Board's Order shall remain as originally stated.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
rdfincher@ksjustice.com

Kevin M. Johnson, Attorney for Respondent and its Insurance Carrier
kjohnson@swabe.com

Honorable Rebecca Sanders, Administrative Law Judge